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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 826

THOMAS KNIGHT, *et al.*,

Appellants,

—v.—

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

ALAN H. LEVINE
New York Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

GOLENBOCK AND BARELL
60 East 42nd Street
New York, New York 10017

LEVY, GUTMAN & GOLDBERG
363 Seventh Avenue
New York, New York

Attorneys for Appellants

Of Counsel:

DONALD D. SHACK
JEREMIAH S. GUTMAN

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Appellants,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the order of the United States District Court for the Southern District of New York, dated June 2, 1967, and the judgment thereon, dated June 5, 1967 and entered June 7, 1967, upholding the constitutionality of Section 3002 of the Education Law of New York, denying plaintiffs' application for an injunction *pendente lite* and granting defendants' motion to dismiss the complaint. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The endorsement memorandum of the Hon. Sylvester J. Ryan, granting plaintiff's motion to convene a three-judge court, is not reported. The opinion of the District Court for the Southern District of New York is reported at 269 F. Supp. 339 (S. D. N. Y. 1967). Copies of the endorsement memorandum and of the opinion are attached hereto as Appendix A.

Jurisdiction

This suit was brought under 28 U. S. C. §1343(3), 42 U. S. C. §1983, 28 U. S. C. §2201, and 28 U. S. C. §2281, to declare unconstitutional and to enjoin the enforcement of a state statute. The order of the District Court dismissing the complaint was dated June 2, 1967; the judgment thereon was dated June 5, 1967 and entered June 7, 1967; and notice of appeal was filed in that Court on July 19, 1967. By order of the District Court dated September 12, 1967, entered September 13, 1967, the time of the plaintiffs to file their jurisdictional statement and docket the case with the Supreme Court was extended to and including November 16, 1967. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Palmetto Fire Ins. Co.* v. *Conn*, 272 U. S. 295, 305 (1926); *Florida Lime and Avocado Growers Inc.* v. *Jacobsen*, 362 U. S. 73, 85 (1960); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

Statutes Involved

§3002 of New York Education Law and §210.00 and §210.05 of the New York Revised Penal Law are set forth in Appendix B.

Questions Presented

Where a state statute requires as a condition of employment in a private school whose real property is wholly or partly exempt from taxes that each citizen teacher take an oath to support the New York State and United States constitutions, does the statutory requirement

A. Violate the teachers' right of free speech, assembly and privacy guaranteed by the First, Ninth and Fourteenth Amendments of the Constitution of the United States because the requirement constitutes a compulsion to profess a belief and because conscientious adherence to the required oath inhibits the free inquiry into and discussion of ideas; or

B. Deprive the teachers of liberty without due process of law guaranteed by the Fourteenth Amendment because the statute is vague, overbroad and arbitrary; or

C. Deny to the teachers the equal protection of the law guaranteed by the Fourteenth Amendment because the statute discriminates unreasonably by requiring the oath to be executed only by citizens who are teachers either in public schools or in private schools whose real property is exempt from taxes?

Statement

Section 3002 of the Education Law of New York makes it unlawful for any United States citizen to serve as a teacher in a public school or in a private school whose real property is exempt from taxation unless he shall take an oath to support the Constitution of the United States and the Constitution of the State of New York. The statute also makes it unlawful for any school official having control over the employment of teachers to permit a person to serve in violation of the statute. Adelphi University is a private institution of higher learning whose real property is tax exempt. Through inadvertence, Adelphi had failed to require the members of its faculty to take the oath until October, 1966 when, at the request of the New York Board of Regents and the Commissioner of Education, James E. Allen, Adelphi made demand upon the members of its faculty to execute the oath.

Appellants are 27 members of the faculty of Adelphi University. They believed that the requirement that they swear loyalty to the state by executing the required oath, upon pain of loss of employment, deprived them of rights guaranteed by the United States Constitution. Accordingly, on November 29, 1966, they commenced this action against the appellees in the United States District Court for the Southern District of New York to declare unconstitutional, and to enjoin enforcement of, Education Law §3002 and the rules and regulations thereunder. At the same time, appellants moved by order to show cause for the convening of a three judge court and for a temporary restraining order, restraining the appellees from enforcing the provisions of §3002 of the Education Law pending

the further order of the Court. The order to show cause contained a stay enjoining the appellees from enforcing those provisions pending determination of the motion. The appellees thereafter moved to dismiss the complaint for failure to state a claim upon which relief could be granted. After hearing oral argument on the various motions, by decision dated April 4, 1967, the District Court determined that the complaint presented a substantial federal question; the motion to convene the three judge court was granted and appellees' motions to dismiss were denied.

The hearing before the three judge court was held on May 2, 1967. The factual representations in the complaint were stipulated to be accurate and, accordingly, the hearing consisted solely of oral argument by counsel. By decision dated June 2, 1967, the District Court held that §3002 of the Education Law did not violate appellants' constitutional rights. The Court denied appellants' motion for an injunction and granted appellees' motions to dismiss the complaint. Notice of appeal was filed on July 19, 1967. By order of the District Court dated July 27, 1967, enforcement of §3002 of the Education Law is stayed against the appellants until the determination of this appeal.

The Questions Are Substantial

1. Section 3002 of the New York Education Law raises fundamental questions under the First and Fourteenth Amendments. We believe that these questions are resolved by well established principles enunciated by the Supreme Court which require the oath to be declared unconstitutional. Nevertheless, the type of affirmative oath required by Section 3002 is in widespread use and its invalidity has

never been precisely determined by the Supreme Court. Thus both the memorandum decision of the District Court ordering the convening of a three-judge court in this action and the decision of that court granting appellee's motion to dismiss the complaint commented that the oath provided for in Section 3002 had not been ruled upon by the Supreme Court. In overruling a similar oath on other grounds, the Supreme Judicial Court of Massachusetts in *Pedlosky* v. *Massachusetts Institute of Technology*, —— Mass. ——, 224 N. E. 2d 414, 416 (1967) said that the Supreme Court of the United States

> "... has made no pronouncement of present pertinency on oaths so limited in scope. No decision of that court delineates the extent of legislative power to prescribe a loyalty oath by teachers in a private institution. No decision of that court deals with an oath confined to supporting the Federal Constitution or that of a State. Nor would it now be constructive for a State court to attempt to formulate the necessary constitutional foundation for a decision on such questions."

Although one searches in vain for a legislative history of New York Education Law §3002, the breeding ground of the section lies in the maze of anti-intellectualism and anti-radicalism and the consequent demand for conformity which were part of the aftermath of World War I. See Hyman, *To Try Men's Souls* (1959); Roche, *The Quest for the Dream* (1963); Preston, *Aliens and Dissenters: Federal Suppression of Radicals,* 1903-1933 (1963); Higham, *Strangers in the Land: Patterns of American Nativism, 1869-1925* (1955); Hofstadter, *The Paranoid Style in American Politics* (1965); Hofstadter, *Anti-Intellectualism in American Life* (1963). In 1931 a general movement to enact teachers' oaths began in earnest. As a result, more

than half of the thirty state laws pertaining to teachers' loyalty currently on the books belong to the period between 1931 and 1937. A rash of legislation stemmed from a Resolution passed by the American Legion in Miami in 1934. The Resolution established a nationwide "Americanization Program" to promote approved opinions and decent respect for American institutions and to prevent their subversion by alien ideas. Section 3002 was enacted during this fervent period. Viewed in the historic perspective of its adoption, the oath requirement is both an expression of distrust of the teaching profession and a device to repress dissent.

New York Revised Penal Law §210.00 and §210.05 provide the basis for a criminal prosecution for perjury for falsely taking the oath. The fact that the oath is a promise of future conduct is not relevant. The oath can be viewed as a statement of present intent and this Court has noted the coercive effect resulting from the possibility of a prosecution for falsely subscribing to such an oath. *Baggett* v. *Bullitt,* 377 U. S. 360 (1964). This Court has also noted that people often label as "communist" ideas which they oppose, that such people often make up our juries and that prosecutors too are human. *Elfbrandt* v. *Russell,* 384 U. S. 11, 16 (1966). The prospect, therefore, of prosecution "for knowing but guiltless behavior," *Baggett* v. *Bullitt,* 377 U. S. 360, 373 (1964) is a reality.

That Section 3002 is a real and continuing threat to the non-conforming teacher is apparent from its terms, which appear to invest officials with the power to refuse to hire teachers who they believe cannot honestly subscribe to the oath. Thus, a school administrator might feel bound not to hire a pacifist, *In re Summers,* 325 U. S. 561 (1945) or

one who voiced strong opposition to American foreign policy, *Bond* v. *Floyd*, 385 U. S. 116 (1966).

The "validity of an oath must be judged on the assumption that it will be taken conscientiously." *Garner* v. *Board of Public Works*, 341 U. S. 716, 726 (1951) (Frankfurter, *J.*, concurring). Accordingly, it may be that the most coercive aspect of the oath is its effect on those teachers "who will not solemnly swear unless they can do so honestly and without prevarication and reservation [and] . . . on those who believe the written law means what it says." *Baggett* v. *Bullitt*, 377 U. S. 360, 374 (1964).

If the "First Amendment gives freedom of mind the same security as freedom of conscience," *Thomas* v. *Collins*, 323 U. S. 516 (1944), and compulsory disclosure threatens those freedoms, then their protection requires a concomitant right of silence. As to certain areas, the government has no right to inquire and the citizen has no obligation to speak. "The domains of conscience and belief," Justice Douglas has said "have been set aside and protected from governmental instrusion. . . . What *a man thinks is of no concern to government.*" *Speiser* v. *Randall*, 357 U. S. 513, 536 (1958) (concurring opinion) (emphasis added). See also, *Sweezy* v. *New Hampshire*, 354 U. S. 234, 266 (1957) (opinion of Frankfurter, *J.*, concurring: "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority").

The oath required by Section 3002 of the Education Law demands nothing less than a statement of belief, namely that the person supports the Constitution. Through pain of loss or denial of employment and through the

other coercive factors referred to, the oath commands the teacher to speak when he has the right to remain silent. Absent some showing of overriding public need, the right to remain silent as to beliefs must prevail.

And so this Court has held when confronted with a compulsory flag salute and pledge of allegiance for public school children, an oral though somewhat more elaborate version of the oath. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). The District Court distinguished *Barnette* as founded on the First Amendment's guarantee of religious freedom, but that decision was not so limited. It spoke in broad First Amendment terms which did not

> "... turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual." *Id.* at 634.

Court after court has viewed *Barnette* as a First Amendment case dealing with freedom of speech and expression. *Brown* v. *Louisiana*, 383 U. S. 131 (1966); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1957); *Thomas* v. *Collins*, 323 U. S. 516 (1944) (Jackson, *J.*, concurring opinion); *Speiser* v. *Randall*, 357 U. S. 513, 536 (1958) (Douglas, *J.*, concurring opinion); *Barenblatt* v. *U. S.*, 360 U. S. 109 (1959) (Black, *J.*, dissenting opinion); *Garner* v. *Louisiana*, 368 U. S. 157 (1961) (Harlan, *J.*, concurring opinion); *O'Brien* v. *United States*, 376 F. 2d 538 (1st Cir. 1967); *United States* v. *Miller*, 367 F. 2d 72 (2nd Cir., 1966);

Tinker v. *Des Moines Independent Community School Dist.*, 258 F. Supp. 971 (S. D. Iowa, 1966); *Chester Branch, NAACP* v. *City of Chester*, 253 F. Supp. 707 (E. D. Pa. 1966); *United States* v. *Smith*, 249 F. Supp. 515 (S. D. Iowa, 1966); *Weaver* v. *Jordan*, 64 Cal. 2d 235, 49 Cal. Rptr. 537, 411 P. 2d 289 (1966); *Katzev* v. *County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310 (1959); *Pennekamp* v. *State*, 150 Fla. 227 (1945), *rev'd* 328 U. S. 331 (1946); *American Federation of Labor* v. *American Sash & Door Co.*, 67 Ariz. 20 (1948), 189 P. 2d 912, *aff'd* 335 U. S. 538 (1949).

The kinship of the compulsory flag salutes to compulsory loyalty oaths is apparent. Mr. Justice Black's concurrence in *Barnette*, for instance, viewed the flag salute as a form of test oath. 319 U. S. at 641. The Court saw such enforced rituals as infringing on the right of free speech, justifiable only upon a showing of a clear and present danger of unlawful action. "It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Id.* 633.

The First Amendment, the Court concluded, excludes the state from the area of speech. Quite simply, the state cannot tell people what to say any more than it can tell them what not to say. "To sustain the compulsory flag salute," the Court said, in terms singularly appropriate here,

> "... we are required to say that a Bill of Rights which guards the individual's right to speak his mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* 637.

The court in *Barnette* ranged well beyond the facts of that case of a student and a flag pledge to cover all kinds of government compelled affirmations, including a blanket oath of loyalty exacted from a teacher. The Court said:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* 642.

The notion that the First Amendment reserved certain areas free from governmental inquiry was well-established long before the now famous exposition of the right of privacy in *Griswold* v. *Connecticut, supra.* Articulated most forcefully by Justice Brandeis, dissenting in *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928), the constitutional right at issue was simply "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." The framers of the Constitution, he said, had "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations."

In recent years, as attempts by the states and Congress to regulate or expose political beliefs have increasingly come up for judicial review, a number of opinions of this Court have had occasion to reaffirm the principle that, in the First Amendment area, governmental action is particularly suspect. In giving substance to the constitutional requirement that "one be permitted to believe what he will," *American Communications Association* v. *Douds,* 339 U. S. 382, 412 (1950), the Court has recognized the threat to freedom of belief raised by government inquiry. "Indi-

vidual freedom and governmental thought-probing cannot live together." *Id.* 446. Because compulsory disclosure of unorthodox or unpopular views tended to suppress First Amendment freedoms, Chief Justice Warren, speaking for the Court in *Watkins* v. *United States,* 354 U. S. 178 (1957), warned Congress and its investigating committees that there is no "general power to expose where the predominant result can only be an invasion of the private rights of individuals." *Id.* 196.

> "Abuses of the investigative process may imperceptibly lead to abridgement of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters public, the reaction in the life of the witness may be disastrous." *Ibid.*

See also, *United States* v. *Rumely,* 345 U. S. 41 (1953).

Such was the reasoning which led the Court in *Barnette* to declare once again that not only did the First Amendment protect what men said but wholly foreclosed governmental inquiry and action where the object was the beliefs which men hold.

> "We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and *invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.*" 319 U. S. 624, 642 (emphasis added).

The District Court's opinion states that Section 3002 and its oath requirement imposes no restriction upon expression by teachers and that the state does not interfere with teachers by requiring them to support the governmental systems which nourish the institutions in which they teach. But the restrictions imposed on teachers by the oath are very real indeed. All of the coercive forces described above, inherent in the oath, are brought to bear upon the teacher. To put the restriction most starkly, the teacher who will not or cannot affirm his loyalty to the state gives up his right to teach. Such a restriction on First Amendment freedoms cannot be based upon a vague and generalized interest of the state in the selection of teachers, an interest which, in New York, is so haphazard as to exclude from the oath requirement the non-citizen teacher and the thousands who teach in the state's private schools not enjoying tax exemption.

Referring to cases in which loyalty oaths had been upheld, this Court in *Speiser* v. *Randall*, 357 U. S. 513, 527 (1958) said:

> "In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of government concern. . . . Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious dangers to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public. The present legislation,

however, can have no such justification. It purports to deal directly with speech and the expression of political ideas. . . ."

What evil shown to be grave does the Section 3002 oath overcome? At no stage of the proceedings in this action have the appellees articulated any such evil. None appears from the legislative history of the statute or from the opinion of the District Court.

It is true that oaths to support the Constitution are required of persons other than teachers. Thus, oaths are required of the President, judges and public officers. In *Bond* v. *Floyd*, 385 U. S. 116 (1966), the Supreme Court said: ". . . a State may constitutionally require an oath to support the Constitution from its legislators which it does not require of its private citizens." Such oaths of high government officials appear to be ceremonial in nature, as suggested by the Court's warning that the sincerity with which a legislator swears to uphold the Constitution may not be tested by his fellow legislators. Whatever the justification, such familiar and traditional undertakings to support the Constitution do not justify the requirement of similar rituals for teachers in a private university.

Assuming that the oath is merely ceremonial in nature, it nevertheless constitutes a compulsory expression of allegiance to the state and thereby prohibits that teacher from being employed who refuses to take the oath by reason of his commitment to intellectual freedom or by reason of his refusal or conscientious inability to express such allegiance. Even though ceremonial in nature, as a compulsory outward expression of allegiance, the oath is prohibited by *Barnette*.

However, the oath is not purely ceremonial. The clear implication of the oath requirement is that those teachers who subscribe to the oath believe something different than those teachers who will not. The former may be hired. The latter may not. Such an inquiry into the belief of teachers, as a condition of their employment, is absolutely foreclosed to the government. If such a limiting power is asserted over teachers in a private university, then there can be no educational institution of any sort where the fullest constitutionally protected freedom of speech may be engaged in, and the concept of academic freedom is made a mockery. Yet the principle of academic freedom is one on which there is and must be concentrated the fullest measure of our constitutional concern:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957).

See also, *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Barenblatt* v. *United States*, 360 U. S. 109, 112 (1959); *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960); *Baggett* v. *Bullitt*, 377 U. S. 360, 369 (1964). And as Mr. Justice Frankfurter wrote in concurrence in *Sweezy*:

> "These pages need not be burdened with proof, based on the testimony of a crowd of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental interven-

tion in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." 354 U. S. at 262.

As recently as January, 1967, this Court reaffirmed our nation's commitment to academic freedom.

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, supra, 364 US at 487, 5 L ed 2d at 236. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through a kind of authoritative selection.' United States v. Associated Press, 52 F Supp 362, 372." *Keyishian* v. *Board of Regents of New York,* 385 U. S. 589 (1967).

2. A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U. S. 385, 391 (1926); *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453

(1939); *Winters* v. *New York*, 333 U. S. 507, 515 (1948). Indefinite oath statutes have a special vice. Not only are they impermissibly vague, but in their vagueness they "abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oathtaker . . . to 'steer far wider of the unlawful zone,' *Speiser* v. *Randall*, 357 U. S. 513, 526 . . . , than if the boundaries of the forbidden area were clearly marked." *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964). This further aggravation of the vice of vagueness demands the strictest standard of application, lest the free dissemination of ideas be the loser. *Cramp* v. *Board of Public Instruction of Orange County*, 368 U. S. 278, 287 (1961); *Smith* v. *California*, 361 U. S. 147, 151 (1959); *National Association for the Advancement of Colored People* v. *Button*, 371 U. S. 415 (1963); *Whitehill* v. *Elkins*, 36 L. W. 4006 (11/7/67).

The oath provisions of Section 3002 requiring a teacher to swear to "support the Constitution of the United States of America and the Constitution of the State of New York" are so vague that few persons of common intelligence will agree upon the obligations which the oath imposes. The range of activities which might reasonably be deemed to be inconsistent with the oath requirements is so broad in scope that a conscientious affiant could reasonably fear that he is asked to refrain from unascertainable areas of constitutionally protected speech and assembly. It is possible, for example, that the phrase "support the Constitution" may mean the avoidance of any categorically direct violation. Perhaps, more plausibly, the phrase "support the Constitution" requires the avoidance of open and active criticism of the form of government established by the

Constitution or of advocacy of violence to overthrow the government. If such is the meaning of the phrase, the statute purports to proscribe activities which include constitutionally protected activity, the Supreme Court having held that advocacy addressed to the abstract doctrine of violence rather than to concrete violence and acts not constituting a clear and present danger may not be punished. *Dennis* v. *United States,* 341 U. S. 494 (1957); *Noto* v. *United States,* 367 U. S. 290 (1961); *Yates* v. *United States,* 354 U. S. 298 (1957); *Scales* v. *United States,* 367 U. S. 203 (1961).

The phrase "support the Constitution" may, among other things, connote an undertaking to take active steps to encourage obedience and respect for the Constitution. The dictionary definition of the word "support" lends credence to such a meaning. Cases under the naturalization "support" oath present other standards which would indicate that active steps are required to "support the Constitution." See, *In re Oppenheimer,* 61 F. Supp. 403, 404 (D. Ore. 1945); *United States* v. *Siepp,* 56 F. Supp. 254 (S. D. Cal. 1944); *In re Shanin,* 278 Fed. 739, 740 (D. Mass. 1922); *Sittler* v. *United States,* 316 F. 2d 312, 325 (2d Cir. 1963) (concurring opinion), *cert. den.* 376 U. S. 932 (1964). At the least, the term, if it has any meaning at all, would proscribe "alteration of . . . the constitutional form of government of the United States," a compulsory undertaking which this Court only a few weeks ago held to violate the Constitution. *Whitehill* v. *Elkins,* 36 L. W. 4006 (11/6/67).

Active steps to encourage obedience and respect for the Constitution might otherwise be defined as the promotion, by precept and example, of respect for the symbols and institutions of the United States, reverence for law and order

and undivided allegiance to our government. It was just such an affirmative undertaking, explicitly written into the Washington oath, that was struck down in *Baggett* v. *Bullitt*, 377 U. S. 360, 371 (1964).

> "The oath exacts a promise that the affiant will, by precept and example, promote respect for the flag and the institutions of the United States and the State of Washington. The range of activities which are or might be deemed inconsistent with the required promise is very wide indeed. The teacher who refused to salute the flag or advocated refusal because of religious beliefs might well be accused of breaching his promise. . . . "

The vices which prompted the Supreme Court to strike down oaths in *Speiser*, *Cramp*, *Baggett* and *Elfbrandt*, *supra*, are all present in Section 3002 of the New York Education Law. The conscientious teacher who takes the oath cannot but be deterred from exercising First Amendment rights guaranteed him by the very Constitution he has sworn to support. The oath must fall because teachers "of character and integrity may well forego their calling rather than risk prosecution for perjury or compromise their commitment to intellectual and political freedom." *Elfbrandt* v. *Russell*, 384 U. S. 11, 18 (1966). The oath must fall because teachers

> "with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restrict-

ing their conduct to that which is unquestionably safe. Free speech may not be so inhibited." *Baggett* v. *Bullitt, supra* at 372.

Little matter that prosecution is unlikely. We deal here with First Amendment freedoms, which "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965).

3. Section 3002 of the Education Law has no rational relationship to any legitimate state purpose. See *Housing Authority* v. *Cordova*, 130 Cal. App. 2d Supp. 883 (1955), *cert. den.* 350 U. S. 969 (1956) (cited with approval in *Sherbert* v. *Verner*, 374 U. S. 398, 405 [1963]). The oath is so piecemeal in its application, that it can scarcely immunize the university from disloyalty or subversive ideas. The statute expressly limits the oath requirement to teachers who are citizens, thus permitting disloyal and antagonistic aliens to be on the faculty. Applying as it does only to teachers and not to administrative personnel, it leaves the establishment of school policy entirely in the hands of those who have not sworn loyalty. The thousands of teachers at non-tax exempt educational institutions are completely exempt from the oath requirements. By singling out teachers as somehow less trustworthy than these other personnel, the State not only establishes an unreasonable classification which deprives the teachers of equal protection of the law, *McLaughlin* v. *Florida*, 379 U. S. 184, 190 (1964), but by its random application of the oath requirement, it precludes any end which that requirement could hope to achieve.

Most important, the oath is self-defeating; its existence can only result in the erosion of those very institutions which the oath seeks to uphold. Government action which seeks to compel patriotic sentiment or silent dissent is contrary to the traditions of a free and open society. As Mr. Justice Black wrote in his separate opinion in *Speiser* v. *Randall, supra,* 357 U. S. at 532:

> "Loyalty oaths, as well as other contemporary 'security measures', tend to stifle all forms of unorthodox or unpopular thinking or expression—the kind of thought and expression which has played such a vital and beneficial role in the history of this nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be. The course which we have been following the last decade is not the course of a strong, free, secure people, but that of the frightened, the insecure, the intolerant. I am certain that loyalty to the United States can never be secured by the endless proliferation of 'loyalty oaths'; loyalty must arise spontaneously from the hearts of people who love their country and respect their government."

CONCLUSION

This Court of the United States has jurisdiction of this direct appeal; the questions presented are substantial. The Court is asked to decide, for the first time, whether a state-compelled affirmation of loyalty, as a condition of employment on the faculty of a private tax exempt university, may stand constitutional scrutiny. The appellants submit that such a requirement, though ostensibly demanding no more than a simple declaration of allegiance, is intolerable in a free society. The issue presented here is no less than the power of the state to compel private citizens to publicly affirm allegiance at its command.

For the reasons stated above, jurisdiction should be noted.

Respectfully submitted,

ALAN H. LEVINE
New York Civil Liberties Union
156 Fifth Avenue
New York, N. Y. 10010

GOLENBOCK AND BARELL
60 East 42nd Street
New York, N. Y. 10017

LEVY, GUTMAN & GOLDBERG
363 Seventh Avenue
New York, N. Y. 10001

Attorneys for Appellants

Of Counsel:

DONALD D. SHACK
JEREMIAH S. GUTMAN

APPENDIX A

Endorsement

66 Civ. 4053

THOMAS KNIGHT, *et al.*,

—v.—

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, *et al.*

Plaintiffs, members of the faculty of defendant Adelphi University, a private school chartered under the Education Laws of the State of New York whose real property is tax exempt, sue on behalf of themselves and the class they represent to enjoin the enforcement of Section 3002 of the Education Laws of the State of New York and rules and regulations by defendants Board of Regents of the University of the State of New York, Adelphi University and the Commissioner of Education. They also seek a declaratory judgment of unconstitutionality and invalidity and the convocation of a three-Judge Court.

All the defendants have moved to dismiss the complaint for lack of jurisdiction and failure to state a claim.

The statute under attack provides:

> "It shall be unlawful for any citizen of the United States to serve as teacher, instructor or professor in any school or institution in the public school system of the state or in any school, college, university or other edu-

cational institution in this state, whose real property, in whole or in part, is exempt from taxation under section four of the tax law unless and until he or she shall have taken and subscribed the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of ..... (title of position and name or designation of school, college, university or institution, to be here inserted), to which I am now assigned.' • • • •"

While this statute was enacted in 1934, the faculty members at Adelphi University were not requested to furnish the oath required until recently. Apparently, many have executed it but the plaintiffs have refused to do so.

The complaint alleges:

(1) That execution of the oath would violate plaintiffs' rights to free speech and assembly under the 1st and 14th Amendments to the Constitution of the United States;

(2) That execution of the oath would violate plaintiffs' rights of due process under the 5th and 14th Amendments of said Constitution because it is overbroad and vague;

(3) That execution of the oath would violate plaintiffs' rights of privacy under the 1st, 9th and 14th Amendments of said Constitution; and

(4) That the statute unlawfully discriminates against plaintiffs and violates their rights of equal protection

of the laws under the 14th Amendment of said Constitution insofar as the oath is required only of teachers who are citizens.

Relying on the various cases before the Supreme Court dealing with the constitutionality of the "loyalty oaths", plaintiffs urge that a substantial federal question is presented which requires this Court either to convene the three-Judge Court or to dismiss the complaint for failure to raise a constitutional issue. *Idlewild Liquor Co.* v. *Epstein*, 370 U. S. 713.

In support of their position that this Court need not convene a statutory Court and that the complaint should be dismissed for lack of jurisdiction, defendants argue that it appears from the several decisions of the Supreme Court and other Courts that the federal question pleaded lacks substantiality. They do concede that the precise question, that is the constitutionality of a constitutional provision without legislative or executive gloss, has never been passed upon but they say that inferentially such a provision has been upheld by the Supreme Court.

While that argument under the cases cited may well lie, no case has been cited which has precisely decided adversely to plaintiffs that this type of clause in this situation is constitutional, and that the question raised is frivolous. All the cases relied on by defendants—*Cramp* v. *Board of Public Instruction; Baggett* v. *Bullitt; Elfbrandt* v. *Russell* and *Bond* v. *Floyd**—dealt with state employees or members of the Legislature as contrasted with private citizens, such as plaintiffs here. As the Court noted in *Wieman** "the public importance of this type of legisla-

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* *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Baggett* v. *Bullitt*, 378 U. S. 127 (1963); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Wieman* v. *Updegraff*, 344 U. S. 183; *Bond* v. *Floyd*, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

tion and the recurring serious constitutional questions which it presents" (344 U. S. 186) attests to the substantiality of the question raised. (cf. *Ex Parte Poresky,* 290 U. S. 30).

Under the pertinent Supreme Court decisions, the complaint on its face presents a substantial federal question; jurisdiction is present. Whatever the opinion of this Court may be as to the legal merits of the claim presented, it may not pass upon it but must leave that to the judgment of the statutory Court. *Levering Co.* v. *Marrin,* 289 U. S. 103; *Keyishian* v. *Board of Regents of University of State of New York,* 345 F. 2nd 236 (C. A. 2, 1965).

Motion to convene the statutory Court is granted; defendants' motions are denied; submit order.

Dated: April 4, 1967.

SYLVESTER J. RYAN
U.S.D.J.

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
The Capitol, Albany, N.Y. 12224
New York Office
80 Centre Street, N.Y. 10013

KARLA MOSKOWITZ
Assistant Attorney,
of Counsel.

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION No. 33601

66 Civ. 4053

THOMAS KNIGHT, STANLEY MILLET, WILLIAM SPINRAD, VIRGINIA TERRIS, STEPHEN I. KLASS, ROBERT ERNST, CLINTON W. TROWBRIDGE, ROBERT Z. BROWN, DAVID S. LEVIN, ABRAHAM KARRASS, ROBERT N. JOHNSON, ABE SHENITZER, HAROLD J. ALLEN, MALCOLM J. ARTH, ELEANORE ALESI, RUBIN STARER, JOHN GALTON, EMIL L. DILLARD, WILLIAM LEE CURRY, RUSSELL HOFFMAN, DONALD SOLITAR, STUART L. ASTOR, JERRY MARCH, DONALD N. KOSTER, THOMAS F. HEFFERNAN, CATTERINE PAPELL and CELIA DESCHIN,

Plaintiffs,

—against—

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, ADELPHI UNIVERSITY, JAMES E. ALLEN, as Commissioner of Education,

Defendants.

ALAN H. LEVINE, Esq., N. Y. Civil Liberties Union.

GOLENBOCK AND BARELL, by DONALD D. SHACK, Esq.

LEVY, GUTMAN & GOLDBERG, by JEREMIAH S. GUTMAN, Esq., Attorneys for Plaintiffs.

HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York, by SAMUEL A. HIRSHOWITZ, Esq., ROBERT E. HUGH, Esq., and KARLA MOSKOWITZ, Esq., Assistant Attorneys General,
Attorneys for Defendants Board of Regents of the University of the State of New York and James E. Allen, as Commissioner of Education.

BENNETT, KAYE & SCHOLLY, by ROBERT J. PAPE, Esq.,
Attorneys for Defendant Adelphi University.

Before MOORE, *C.J.*, RYAN and TYLER, *D.JJ.*

TYLER, *D.J.*

Plaintiffs are twenty-seven faculty members at Adelphi University, a private, non-profit institution of higher learning located in Garden City, New York and tax exempt under Section 420 of the New York Real Property Tax Law.

Section 3002 of the New York Education Law requires every citizen teacher, instructor or professor in any public school or in any private school the real property of which is in whole or in part exempt from taxation to execute an oath. In pertinent part, Section 3002 reads as follows:

> "Oath to support federal and state constitutions. It shall be unlawful for any citizen of the United States to serve as teacher, instructor or professor in any school or institution in the public school system of the state or in any school, college, university or other educational institution in this state, whose real property, in whole or in part, is exempt from taxation under section four of the tax law unless and until he

> or she shall have taken and subscribed the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of ..... (title of position and name or designation of school, college, university or institution to be here inserted), to which I am now assigned.'"

Although this statutory requirement dates back to 1934, through inadvertence Adelphi had not previously requested that its faculty members execute the oath. In October, 1966, however, upon being made aware of the statute, the administrative offices of Adelphi asked all the members of its teaching staff to sign and return the oath. Plaintiffs have refused to do so, instead bringing this action to enjoin the enforcement of the oath provision. They allege that the requirement is unconstitutional in that it violates their rights under the First, Fifth, Ninth and Fourteenth Amendments of the Constitution.

On April 4, 1967, Judge Ryan signed an order that this cause be heard and determined by a three-judge court pursuant to 28 U. S. C. §§2281 and 2284. Argument was heard on May 2, 1967.

So far as we can determine, the precise question of whether an oath such as that provided for by Section 3002 may constitutionally be required of teachers has not been ruled upon by the Supreme Court. That Court, however, has recently stated that Georgia's requirement that her legislators take a similar oath in no way impinges upon the First Amendment's protection of free speech. *Bond* v. *Floyd*, 385 U. S. 116, at 132 (1966). Moreover, the Court, in striking down so called "negative loyalty oath" require-

ments of the states, has never suggested that the First Amendment proscribes any form of oath or affirmation required of teachers. See, e.g., *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966).

Plaintiffs rely heavily upon *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943) in which the Supreme Court held unconstitutional a state statute requiring school children to salute and pledge allegiance to the American flag. The pledge of allegiance there involved, however, was far more elaborate than the affirmation required by New York of teachers in public and tax supported educational institutions. Furthermore, the decision in *Barnette* was based on the First Amendment's guarantee of religious freedom. The plaintiffs there were members of a religious group who claimed that the requirement of the oath and accompanying salute violated their religious beliefs. No such claim or allegation is made here.

Because the school children in *Barnette* faced stiff penalties should they refuse to salute and pledge allegiance to the flag, plaintiffs in this case have suggested that Section 29 of the New York Penal Law[1] must be read into Section 3002 to make a violation thereof a misdemeanor. Literally, this would appear to be so, but in fact the New York courts have exhibited a notable reluctance to so apply Section 29. In recent years, the state courts have reasoned that an act or a failure to act is not a crime unless the legislature, in addition to forbidding it, imposes a specific penalty for its commission. See, e.g., *People* v. *Luongo*, 39 Misc. 2d 905 (Sup. Ct., Kings County, 1963) and cases cited therein.

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[1] "Where the performance of any act is prohibited by a statute, and no penalty for the violation is imposed in any statute, the doing of such act is a misdemeanor."

Plaintiffs also urge that Section 3002 suffers the vice of vagueness. In support of this theory, they rely upon the line of Supreme Court cases striking down "negative loyalty oaths" or "non-Communist oaths". See, e.g., *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Keyishian* v. *Board of Regents of New York*, 385 U. S. 589 (1967); *Elfbrandt* v. *Russell*, *supra*; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961). As plaintiffs' counsel candidly conceded at oral argument, however, such oaths, which typically require an affiant to state that he is not now and has never been a member of certain organizations, present a very different problem.

The language of Section 3002 is simple and clear in its import. It requires no more than that the subscriber affirm that he will support the constitutions of the United States and the State of New York and that he will be a dedicated teacher. The statutory language of support of the constitutional governments can be substantially equated to that allegiance which, by the common law, every citizen was understood to owe his sovereign. 1 *Blackstone's Commentaries* (Fifth Edition) 369.[2] As for the statutory requirement of professional dedication, we have been referred to the recent case of *Pedlosky* v. *M. I. T.*, —— Mass. ——, 224 N. E. 2d 414 (1967) which voided a strikingly similar portion of a Massachusetts statute. Aside from the fact that we are not bound by the holding in *Pedlosky*, we are not persuaded by its reasoning. In our view, a state can reasonably ask teachers in public or tax exempted institu-

[2] "Which occasions Sir Edward Coke very justly to observe, that 'all subjects are equally bounden to their allegiance, as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same'."

tions to subscribe to professional competence and dedication.

Plaintiffs, conceding that it is constitutionally permissible to demand from public officials, federal and state, an oath or affirmation substantially the same as that set forth in Section 3002, suggest that different considerations apply to teachers. In sum, it is said that teachers' speech must be totally "free of interference". But, as may be implied from what has already been said, we interpret the statute to impose no restrictions upon political or philosophical expressions by teachers in the State of New York. A state does not interfere with its teachers by requiring them to support the governmental systems which shelter and nourish the institutions in which they teach, nor does it restrict its teachers by encouraging them to uphold the highest standards of their chosen profession. Indeed, it is plain that a state has a clear interest in assuring " . . . careful and discriminating selection of teachers" by its publicly supported educational institutions. See *Shelton* v. *Tucker*, 364 U. S. 479, at 495-496 (1960), (dissenting opinion of Frankfurter, J.), see also majority opinion at 485.

The plaintiffs' motion for an injunction *pendente lite* is denied, and defendants' motion to dismiss the complaint is granted. It is so ordered.

Dated: New York, N. Y.
June 2, 1967.

LEONARD P. MOORE
U.S.C.J.

SYLVESTER J. RYAN
U.S.D.J.

H. R. TYLER, JR.
U.S.D.J.

APPENDIX B

Section 3002 of the Education Law and Sections 210.00 and 210.05 of the New York Revised Penal Law

§3002. Oath to support federal and state constitutions

It shall be unlawful for any citizen of the United States to serve as teacher, instructor or professor in any school or institution in the public school system of the state or in any school, college, university or other educational institution in this state, whose real property, in whole or in part, is exempt from taxation under section four of the tax law unless and until he or she shall have taken and subscribed the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of ..... (title of position and name or designation of school, college, university or institution to be here inserted), to which I am now assigned."

The oath required by this section shall be administered by the president or other head of such school, college, university or institution, or by the officer or person, or in the case of a board or body by a member of the board or body, having authority to employ such person as a teacher, instructor or professor in such school, college, university or institution, and each is hereby authorized to administer it. The officer, person or member administering such oath shall cause a record or notation of the fact to be made in the books or records of the school, college, university or institution, and forthwith transmit the oath as taken and sub-

scribed to the commissioner of education, who shall file it in his office, where it shall be subject to public inspection. It shall be unlawful for an officer, person or board having control of the employment, dismissal or suspension of teachers, instructors or professors in such a school, college, university or institution, to permit a person to serve in any such capacity therein in violation of the provisions of this section. This section shall not be construed to require a person to take such oath more than once during the time he or she is employed in the same school, college, university or institution, though there be a change in the title or duties of the position.

The provisions of section thirty of the civil service law shall not apply to a person who is required to take the oath prescribed by this section.

§210.00 Perjury and related offenses; definitions of terms

The following definitions are applicable to this article:

1. "Oath" includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.

2. "Swear" means to state under oath.

3. "Testimony" means an oral statement made under oath in a proceeding before any court, body, agency, public servant or other person authorized by law to conduct such proceeding and to administer the oath or cause it to be administered.

4. "Oath required by law." An affidavit, deposition or other subscribed written instrument is one for which an "oath is required by law" when, absent an oath or swearing

thereto, it does not or would not, according to statute or appropriate regulatory provisions, have legal efficacy in a court of law or before any public or governmental body, agency or public servant to whom it is or might be submitted.

5. "Swear falsely." A person "swears falsely" when he intentionally makes a false statement which he does not believe to be true (a) while giving testimony, or (b) under oath in a subscribed written instrument. A false swearing in a subscribed written instrument shall not be deemed complete until the instrument is delivered by its subscriber, or by someone acting in his behalf, to another person with intent that it be uttered or published as true.

6. "Attesting officer" means any notary public or other person authorized by law to administer oaths in connection with affidavits, depositions and other subscribed written instruments, and to certify that the subscriber of such an instrument has appeared before him and has sworn to the truth of the contents thereof.

7. "Jurat" means a clause wherein an attesting officer certifies, among other matters, that the subscriber has appeared before him and sworn to the truth of the contents thereof. L. 1965, c. 1030, eff. Sept. 1, 1967.

§210.05 Perjury in the third degree

A person is guilty of perjury in the third degree when he swears falsely.

Perjury in the third degree is a class A misdemeanor. L. 1965, c. 1030, eff. Sept. 1, 1967.

SUPREME COURT, U. S.

DEC 29 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 826

THOMAS KNIGHT, et al.,

Appellants,

against

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM BY APPELLANTS, BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK AND JAMES E. ALLEN, AS COMMISSIONER OF EDUCATION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees,
Board of Regents of the
University of the State of New York,
and James E. Allen, as
Commissioner of Education

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

CHARLES A. LA TORELLA, JR.
MARIA L. MARCUS
Assistant Attorneys General
of Counsel

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MOTION TO DISMISS OR AFFIRM BY APPELLANTS, BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK AND JAMES E. ALLEN, AS COMMISSIONER OF EDUCATION

Appellees, the Board of Regents of the University of the State of New York and James E. Allen, as Commissioner of Education, move pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, that the judgment of the United States District Court for the Southern District of New York be affirmed or, in the alternative, that this appeal be dismissed.

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 826

THOMAS KNIGHT, et al.,

Appellants,

against

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, et al.,

Appellees.

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Opinions Below

The endorsement memorandum of the Hon. Sylvester J. Ryan, District Judge, granting plaintiffs' motion to convene a three-judge District Court is not reported. The opinion of the District Court for the Southern District of New York is reported at 269 F. Supp. 339. Copies of the endorsement memorandum and of the opinion are reproduced as Appendix "A" to appellants' jurisdictional statement.

Jurisdiction

Appellants invoke the jurisdiction of this Court under 28 U.S.C. Section 1253.

Statutes Involved

New York State Education Law § 3002 and New York Revised Penal Law §§ 210.00 and 210.05 (Appellants' Appendix "B").

Question Presented

Does the question of the constitutionality of the statute requiring citizens who teach in public and publicly supported educational institutions in New York to make an affirmation of support for the State and Federal Constitutions and of faithful performance as a teacher raise a substantial federal question requiring a full hearing before this Court?

Statement

Section 3002 of the New York Education Law declares that it is unlawful for any United States citizen to serve as a teacher in the public school system of the State, or

in any private educational institution whose real property is exempt from taxation, unless he shall take an oath in which he swears simply to perform his duties as a teacher faithfully, and to support the Constitutions of the United States and the State of New York. The statute also declares that it is unlawful for any school official having control over the employment of teachers to permit a person to serve in violation of the statute. The statute does not, however, prescribe any penalty for a violation thereof, nor does any other statute explicitly operate to provide a penalty for violation of Section 3002. Appellants claim in this Court that they may possibly be liable for prosecution for "perjury in the third degree" (a misdemeanor), under New York Revised Penal Law §§ 210.00 and 210.05, if they take the oath.

Although Education Law § 3002 was enacted in 1934, Adelphi University, a private institution of higher learning whose real property is tax exempt, had not required its faculty members to take the oath, through inadvertence. In October 1966, at the request of the Board of Regents of the University of The State of New York and the State Commissioner of Education, James E. Allen, Adelphi University requested that the members of its faculty execute the oath.

The appellants are members of the faculty of Adelphi University. When they were requested to take the oath, they refused and commenced this action against the appellees in the United States District Court for the Southern District of New York on November 29, 1966. In the complaint appellants sought to declare Section 3002 unconstitutional and to enjoin its enforcement. At the same time, appellants moved for the convening of a three-judge District Court and for a temporary restraining order enjoining the appellees from enforcing the provisions of Section 3002 pending the futher order of the Court. The appellees moved to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief could be

granted. By memorandum endorsement dated April 4, 1967, the District Judge denied appellees' motion and granted appellants' motion to convene a three-judge Statutory Court.

A hearing before the three-judge Court was held on May 2, 1967. By decision dated June 2, 1967, the District Court held that Education Law § 3002 did not violate appellants' constitutional rights and was not unconstitutional. Accordingly, the Court denied the motion for an injunction pendente lite and granted appellees' motion to dismiss the complaint. Notice of appeal was filed on July 19, 1967. By order of the District Court dated July 27, 1967, enforcement of Education Law § 3002 against the appellants was stayed pending the determination of this appeal.

No Substantial Federal Question Is Presented Requiring Full Hearing Before This Court

I. The challenged oath of office required by New York State is a valid exercise of its power to regulate and supervise education. Such oaths have been implicitly upheld by this Court.

The challenged oath (or affirmation), identical to the oath of office prescribed for certain state and federal officials, merely requires affirmation of support for the United States and New York Constitutions (U. S. Const. Art. II, § 1, Art. VI; N. Y. Const. Art. 13, § 1). This Court has made clear that a narrowly drawn oath is constitutionally permissible as a condition of holding office or obtaining governmental privileges. As was held in *American Communications Association* v. *Douds*, 339 U. S. 382, 414:

> "It is obvious that not all oaths were abolished; the mere fact that § 9(h) is in oath form hardly rises to the stature of a constitutional objection . . ."

This ruling was recently affirmed in *Bond* v. *Floyd*, 385 U. S. 116, 132, where this Court noted its agreement with

the constitutional oath of office required by the State of Georgia:

> "Thus we do not quarrel with the State's contention that the oath provisions of the United States and Georgia constitutions do not violate the First Amendment."

The sole question presented by appellants' Jurisdictional Statement is whether this particular oath violates constitutional strictures either because of the affirmation required or because of its application to plaintiffs. We submit that the recent holdings by this Court in such cases have implicitly rejected this challenge.

Appellants erroneously characterize the provision in question as a loyalty oath. This is without merit. We are dealing here with an affirmation of support for the Federal and State Constitutions and clearly not a loyalty oath directed against subversive activities or membership in groups sponsoring such activities. It is significant that appellants ignore the second portion of the oath in which affiant promises to perform his duties as a teacher faithfully. This second portion demonstrates that the entire provision is indeed an oath of office.

Objection to the content of the oath is based in part on the argument that it would require orthodoxy of thought and constitute an invasion of privacy in violation of the First, Ninth and Fourteenth Amendments of the United States Constitution. It is suggested, for example, that, by reason of such oath, teachers objecting to United States foreign policy might not be hired by school administrators (Jurisdictional Statement p. 8). This is a speculation for which no factual basis is presented. The fallacy in this argument is inherent in the very case which appellants have chosen to illustrate it. In *Bond* v. *Floyd*, *supra*, this Court in explicit terms differentiates support for the Con-

stitution from agreement with particular aspects of national policy:

> "... while the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy. The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." (385 U. S. at p. 135)

Thus, the constitutional oath of office does not suppress the right of legislators to express political views, inquire into and criticize state or national policy, nor would it suppress similar freedom on the part of teachers and academicians to do so. The District Court in its opinion, likewise, found the statute "to impose no restrictions upon political or philosophical expressions by teachers in the State of New York" (App. p. 32). The record of activities of teachers in the outstanding colleges and universities in New York shows the lack of any substance to the assertions of appellants. New York teachers in such institutions would be astounded to learn that they are restricted in their expressions simply by the statutory oath to which they have all subscribed.

The case of *West Virginia State Board of Education* v. *Barnett*, 319 U. S. 624, is inapposite since it involved compliance with a ritual salute and pledge of allegiance to the flag which interfered with the religious freedom of Jehovah's Witnesses (who abhor "graven images"). This Court held that West Virginia could not require the ritual of all school children at the beginning of each school day, but must excuse those who objected to such a surrender of their religious freedom.

The fear of penal sanction for mental reservation when taking the oath is simply an exercise in imagination. It is unreal and would not justify the invocation of any penal sanction or even any far-fetched possibility of such risk. In accordance with the general rule that violation of a promise of future conduct will not support a prosecution for perjury, alleged violation of official oaths would not constitute perjury. *State* v. *McCarthy*, 255 Wis. 234, 38 N. W. 2d 679. (See also 70 C.J.S. pp. 462-463.) In the District Court appellants sought to conjure up other penal sanctions. The District Court found there was no merit to such contentions (App. p. 30) and their argument in the District Court has not been renewed. Instead the fictitious risk of perjury has been rolled out for this Court. This, too, has no factual or legal merit.

Appellants further urge that the "right to be left alone" is paramount over the state requirements here in question. It should be noted that unlike the *Barnett* case, where school children were required under compulsion to attend school and to engage in the ritual salute, appellants are voluntarily seeking to teach in public or publicly supported schools. The rationale of *Hamilton* v. *Regents*, 293 U. S. 245, is pertinent here. There, this Court held that as to students voluntarily enrolling in a state college, there was no right to be excused from required military training courses. Those who take advantage of opportunities and privileges offered by the State may not, on the grounds of conscience, refuse compliance with reasonable conditions imposed upon them. Since the government had the power to impose the draft itself upon men of military age, it had a corollary power to prescribe military training.

There can be no question that education is equally a matter of vital state concern and that educational institutions and their faculties are subject to reasonable state regulation under the police power. *Institute of Metropolis, Inc.* v. *University of the State of New York*, 159 Misc. 529 (Sup. Ct. Albany Co. 1936), *aff'd* 249 App. Div. 33 (3rd

Dept. 1936), *aff'd* 274 N. Y. 504 (1937). See also *Adler* v. *Board of Education of City of New York*, 342 U. S. 485, 493 (1952); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 602; *Shelton* v. *Tucker*, 364 U. S. 475, 485, 495-496.

Section 3002 of the Education Law applies solely to teachers employed in the public school system of the State and those on the faculty of "any school, college, university or other educational institution in this state, whose real property in whole or in part, is exempt from taxation . . .". Certainly the State may impose reasonable conditions for employment on the faculties of private institutions enjoying tax exemption, including the taking of an oath which is merely a "minimal" affirmation of support for the Constitution. *Cf. Speiser* v. *Randall*, 357 U. S. 513; *Meyer* v. *Nebraska*, 262 U. S. 390, 402.

II. The provision in question is not unconstitutionally vague in violation of the First Amendment of the United States Constitution.

The oath of office simply requires adherence to a constitutional standard of conduct. Since it is identical to the oath taken by virtually every public officer on federal, state and local levels, its language can hardly be said to be mysterious or unclear.

None of the cases cited by appellants provide any support for the argument that the oath is unconstitutionally vague. In *Baggett* v. *Bullitt*, 377 U. S. 360, this Court held that two statutes of the State of Washington were uncertain and over-broad. The 1931 statute required teachers to aver their respect for the "flag and institutions" of the United States and the State of Washington and their "undivided allegiance to the government of the United States". The 1955 oath applicable to all state employees provided that no "subversive person" shall be eligible for public employment. These statutes were found to have left a wave of confusion in their wake. None of such doubts inhere in the

case at bar which does not impinge on free criticism of United States institutions and policies as well as advocacy of unpopular views, *Bond* v. *Floyd, supra.*

In *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, a Florida statute required all state employees to aver that they had never knowingly lent "aid, support, advice, counsel or influence to the Communist party". This language aroused the same questions as the provisions in *Baggett*. Obviously, such provisions lend themselves to the conclusion that they are unconstitutionally restrictive of conduct while the oath of office challenged here would be restrictive only of conduct impermissible under the Constitution.

Elfbrandt v. *Russell*, 384 U. S. 11, struck down an oath subjecting any state employee who knowingly became a member of the Communist party or any other organization having as its purpose the overthrow of the government of Arizona, to prosecution for perjury and discharge from employment. This Court found unduly restrictive the statute's coverage of employees who had joined but never participated in the activities of revolutionary organizations. Mr. Justice Douglas observed that the first portion of the challenged oath read in a "conventional fashion"—that is, it was identical to the usual oath to support the Federal and State Constitutions, the oath here. However, "The legislature put a gloss on the oath" by adding the loyalty provisions and references to political organizations.

It should be noted that *Baggett, Cramp* and *Elfbrandt* all included constitutional oaths of office which were not held objectionable and in each of these cases this Court based its rejection on the unclear terminology of the "anti-subversive" portions.

This distinction was also underlined by a three-judge Federal Court in *Georgia Conference of American Association of University of Professors* v. *Board of Regents*, 246 F. Supp. 553, 555 (N. D. Ga. 1965):

> "The sum of our holdings with respect to the 1935 statute and the 1949 statute as amended in 1950 is

that plaintiffs may be required to swear to uphold, support and defend the Constitution and laws of Georgia and of the United States and that they are not members of the Communist Party. They have not objected to doing so. The balance of the oaths prescribed in the statutes are void."

In *Whitehill* v. *Elkins*, —— U. S. ——, 19 L. ed. 2d 228, 36 L. Week 4006 (Nov. 7, 1967), this Court struck down a Maryland oath which appeared to proscribe abstract advocacy of violent overthrow of the government. Such abstract expression of opinion is constitutionally protected and, therefore, would not violate an oath to support the Constitution called for by the challenged statute. Indeed, this Court indicated in *Whitehill* that a more "narrowly drawn" oath would have been acceptable.

It is respectfully submitted that if any oath fits that definition, it is the oath challenged here.

III. The provision in question does not deprive appellants of the equal protection of the law.

Appellants admit (p. 14) that oaths to support the Constitution are required of the President, judges and public officers. As the District Court opinion notes, appellants conceded upon the argument that there was no tenable objection to such oaths (App. p. 32). It is urged by appellants, however, that such oaths "appear to be ceremonial in nature" and that this may somehow make them permissible as to government officials but not as to teachers in public or publicly-supported universities (Br. p. 14).

However, appellants overlook the fact that adherence to a substantially identical provision is required of many private citizens who exercise particular functions of vital concern to the State. Attorneys, for example, are required by New York Judiciary Law § 276 to take the "constitutional oath of office". Such an oath required of attorneys

has been upheld in *In re Summers*, 325 U. S. 561. It would be curious indeed if a candidate for admission to the Bar of this Court were to claim that his views as to the Constitution could be suppressed in any way pursuant to the oath he is required to take upon admission under Rule 5 of this Court. If it be argued that academic freedom requires a greater scope of inquiry and advocacy than that required by attorneys in this Court—a proposition which appears to be inherently fallacious—it should again be noted that the provision in question requires faithful performance as a teacher. Such performance must necessarily include full exercise of academic freedom and free inquiry into popular and unpopular ideas.

It is axiomatic that the equal protection clause only prohibits invidious discrimination. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489. Furthermore, the Legislature may properly legislate with respect to certain groups in a general class without having to include all in such legislation. *Gold* v. *DiCarlo*, 235 F. Supp. 817 (S.D.N.Y. 1964), *aff'd* 280 U. S. 520. Certainly, Education Law § 3002 is not an unconstitutional denial of equal protection to these plaintiffs simply because the statute does not require a constitutional oath from non-professional employees at Adelphi and other universities rather than just members of the faculty. See, too *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79; *Wilson* v. *New*, 243 U. S. 332; *Bryant* v. *Zimmerman*, 278 U. S. 63, 73-77.*

The Legislature chose to exclude non-citizen teachers from executing the oath of office. The reason for this is clear—if aliens took an oath of support for the United States and State Constitutions, they might lose their own

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* Appellants' brief refers also to "thousands of teachers at non-tax exempt educational institutions" as "exempt from the oath requirements" (Br. p. 20). We know of no support for such assertion. All nonprofit schools in New York State are considered tax exempt under New York Real Property Tax Law §§ 420 *et seq.*

citizenship. While the State has the power to prohibit aliens from professions affected with the public interest (e.g. nursing, New York State Education Law §§ 6905, 6906 and medicine, New York State Education Law § 6506), it has chosen not to exclude them from the teaching field. Having made this choice, however, it would have been anomalous to require them to forfeit their own nationality. In an analogous area, attorneys who are not citizens of the United States but who are admitted to practice in the courts of their own country, may argue before this Court in certain circumstances under Rule 6 but are not required to subscribe to the attorney's oath under Rule 5.

Nor is it unreasonable for the Legislature to have imposed requirements on teachers, pursuant to the public trust vested in them, which are not imposed upon administrators of universities whose dealings are with finances rather than the education of a new generation. *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U. S. 589.

The classification created by the Legislature in § 3002 of the Education Law do not irrationally discriminate against appellants nor indeed against any other teachers in public or tax-exempt institutions. Such classification is, therefore, free from constitutional infirmities. Appellants simply are averse to the requirement of any oath.

CONCLUSION

For the foregoing reasons, the within motion to dismiss or affirm should be granted.

Dated: New York, New York, December 27, 1967.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees,
Board of Regents of the
University of the State of New York,
and James E. Allen, as
Commissioner of Education

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

CHARLES A. LA TORELLA, JR.
MARIA L. MARCUS
Assistant Attorneys General
of Counsel

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 826. Decided January 22, 1968.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE STEWART is of the opinion that probable jurisdiction should be noted.